No. 95-1639

In the
Supreme Court of the United States
October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

CHRISTOPHER LEE ARMSTRONG, et al.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS SHELTON AUNTWAN MARTIN, JASON HAMILTON, CHRISTOPHER LEE ARMSTRONG, AND FREDDIE MACK

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CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be . . . deprived of life, liberty or property, without due process of law."

Section 242 of Title 18 U.S.C. provides in pertinent part:

> Whoever, under color of any law, . . . willfully subjects any inhabitant of any State to . . . different punishments, pains, or penalties, . . . by reason of his color, or race, . . . shall be fined not more than $1000 or imprisoned not more than one year, or both. . . .

Section 994(d) of 28 U.S.C. provides in pertinent part, "The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race . . . of offenders."

Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure provides in pertinent part:

> *Documents and Tangible Objects.* Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, . . . or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense. . . .

Criminal Rule 17(c) provides in pertinent part:

> *For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books,

papers, documents, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

STATEMENT OF THE CASE

(1) In 1992, respondents were arrested on charges of distributing cocaine base (crack), illegal possession and use of handguns, and conspiracy. The criminal conduct alleged was prohibited by both federal[1] and California law.[2] The investigation which led to those arrests had been initiated by the Los Angeles Police Department[3], and local police were involved throughout the investigation as well as in several of the arrests. The United States Attorney's Office for the Central District of California determined to prosecute the respondents in federal court. Accordingly, on April 21, 1992, respondents were indicted by a grand jury in that district.

The decision to pursue federal charges against respondents was a momentous one. Both the minimum and maximum sentences imposed by federal law are far higher than those established by California law. The difference in potential sentence varied with the charges and prior record, if any, of each of the defendants.

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[1] 21 U.S.C. §§ 841(a)(1) (distribution of crack), 846 (conspiracy); 18 U.S.C. § 924(c) (firearms).

[2] Cal. Health and Safety Code, §§ 11351.5, 11352.

[3] J.App. 75-76.

	Potential Sentence[4]	
	State Sentence	Federal Sentence
Armstrong	3-9 years	55 years to life
Hampton	3-14 years	Mandatory life term
Mack	3-5 years	10 years to life
Martin	3-10 years	35 years to life
Rozelle	3-13 years	45 years to life

In practice, the differences are even greater because inmates in state prison receive an unlimited amount of good time credit at the rate of one day of credit for each day of good time[5], whereas good time credits for federal inmates are capped at 54 days per year.[6] Thus a state inmate with a 5 year sentence may serve as few as 30 months, while a federal prisoner with the same sentence must serve at least 51 months.

(2) In July, 1992, respondents, all of whom are black, filed a motion alleging that they had been selected for federal prosecution because of their race, and seeking discovery. The motion requested an order directing the government to provide respondents with "documentary evidence or information" regarding four matters: (a) the race of other individuals prosecuted for crack distribution either under federal statutes or "under state statutes applicable to the distribution of cocaine base" (b) the race

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[4] California Health and Safety Code §§ 11351.5, 11352, 11370.1, 11370.2; California Penal Code §§ 667.5, 1170.1; 21 U.S.C. §§ 841(a)(1), 846, 924(c). The sentences in each case include enhancements, as provided by law, for prior convictions and for firearms violations.

[5] California Penal Code §§ 2931, 2933.

[6] 18 U.S.C. § 3624(b)(1).

of individuals who had been arrested in federal or joint federal-state investigations, (c) the race of individuals who "use, distribute, or possess with intent to distribute cocaine base", and (d) the standards regarding which crack cases "will be accepted for federal prosecution and when such cases will be referred or left to the state authorities for prosecution." (Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution, p. 2-3.)

In support of the motion, respondents submitted a study compiled by the Federal Public Defender of every crack case closed by that office in 1991[7]. The study identified twenty-four such cases; in every instance the defendant against whom the charges had been brought was black. (J.App. 68-70) At the September 8, 1992, hearing on the motion, counsel for the Federal Public Defender explained that the office had sought without success to obtain comparable information about state prosecutions, and that the motion asked that federal officials be directed to produce such information because federal and state officials "have access to one another's data."[8] Neither in its written response to the motion for this information nor at the September, 1992, hearing did the government dispute respondents' contention that the United States Attorney, but not the respondents, had possession of or access to this information.

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[7] The study was based on several weeks of work by a paralegal who reviewed all Federal Public Defender cases for the period. J.App. 153, 159.

[8] J.App. 156; see also *id.* at 146 ("it is considerably more difficult for us to obtain information from law enforcement, and statistics that we believe must be available simply by the nature of the U.S. attorney's office").

In our discovery motion, respondents specifically invited the government to "offer some explanation" for the results of the study.[9] The written response submitted by the United States Attorney, however, made no effort to do so. At the hearing on the motion, the district judge expressed understandable concern that "the Government hasn't offered any explanation at all as to why . . . persons . . . being brought . . . to Federal court for these drug offenses . . . all . . . are black."[10] Surprisingly, counsel for the government responded that he had no idea why this had occurred. "I can't explain why the public defender's office has only encountered black defendants [in] crack cocaine cases – I would have no explanation for that."[11]

In the face of this response, the district judge granted the motion for the requested discovery.[12] With regard to the requested documents or information regarding the patterns of crack prosecutions, the court limited the discovery required to a three year period from 1989 through 1991.[13] The judge emphasized that "what the Court wants to know is whether or not there is any criteria in deciding which of these cases will be filed in state court versus Federal court and if so, what is that criteria."[14]

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[9] Motion for Discovery and/or Dismissal for Selective Prosecution, p. 11.

[10] J.App. 149.

[11] J.App. 150.

[12] J.App. 150, 161-62.

[13] J.App. 153, 162.

[14] J.App. 162.

After the district judge had granted the motion from the bench, counsel for the government for the first time argued that some effort might be required to produce the statistical information; in response the district judge offered to "give some guidance and make additional rulings if Government's Counsel requests" narrowing or clarifying the discovery order.[15] In light of that argument, the district judge repeatedly asked counsel for the government to advise the court how much delay would be needed to comply with the discovery order.[16] The district court also agreed to a request from the prosecution that it be accorded an opportunity to submit a separate memorandum regarding whether the government's criteria for selecting the narcotics cases to be filed in federal court might be exempt from discovery.[17]

(3) The United States moved for reconsideration of the district court's discovery order. The United States Attorney represented to the District Court that in any case in which there was so much as "one scintilla of evidence"[18] of selective prosecution, the government would voluntarily "initiate a full and complete investigation into it and would expend whatever resources necessary", even if any discovery motion at issue "failed to meet the legal requirement" for discovery.[19] The government insisted, however, that a district judge could not order or conduct such an inquiry into the same issue

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[15] J.App. 152.

[16] J.App. 151, 158, 159, 162-63.

[17] J.App. 163.

[18] J.App. 179.

[19] Government's Motion for Reconsideration, p. 5 n.1.

unless the defendant first met a high evidentiary threshold. The government supported its motion with several declarations and certain documentary material; respondents in turn introduced additional declarations. These conflicting presentations raised several complex factual disputes.

The United States sought in several ways to attack the probativeness of the initial Public Defender study. First, the government offered materials which it argued showed that the all-black group identified by the study was the result, at least in part, of a tendency of blacks to predominate in the sale of crack.[20] Respondents in reply adduced two declarations stating that there were a substantial number of non-black crack users and dealers. (J.App. 138, 140). One of the declarations was from a member of the Board of Directors of the Los Angeles Criminal Courts Bar Association Indigent Defense Panel, the primary source of private court-appointed counsel for indigent state defendants in Los Angeles County. Based on his own litigation experience, as well as on what he had learned while serving as a Director of that panel, he

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[20] Counsel for the government summarized its evidence, and contentions, as follows: "[*P*]*art* of the reason why there apparently seem to be so many black defendants that are coming forth in these sort of prosecutions, is that the particular type of narcotic is controlled, *in the large part*, by street gangs . . . [that] operate out of areas that are very *heavily* minority, and so as a result of that, *oftentimes*, the type of dealers . . . are from these street gangs [whose] . . . membership . . . is *fairly minority heavy*, specifically black African Americans." J.App. 170 (Emphasis added).

concluded that there were numerous non-black defendants being prosecuted in state court for crack sales, many of whom had prior narcotics convictions. (J.App. 141). Second, an Assistant United States Attorney asserted that his office had been able to identify eleven non-black crack dealers who had been prosecuted in federal court.[21] Respondents pointed out, in rebuttal, that all of the defendants identified were Asian or hispanic, and that this survey concerned a decidedly different pool (all federal prosecutions over a three year period) than the Federal Public Defender Study (cases closed by that office in a single year).[22] Third, the government relied on argument of counsel criticizing the scope of that study.[23] Neither party objected to the admissibility of the other's evidence; the dispute concerned the conflicting factual inferences to be drawn from each. The district judge concluded that it would be inappropriate to hold, "without expert testimony"[24], that the results of the Federal Public Defender study stemmed from a paucity of non-black crack dealers.

The United States also sought to show that the defendants in this case had been selected for prosecution, not

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[21] J.App. 169, 201. The government identified five non-black defendants in a three year period who had been represented by the Federal Public Defender, an average of two per year.

[22] J.App. 180, 203.

[23] J.App. 201 (only a single year); Government's Motion for Reconsideration, p. 8 (only Federal Public Defender cases).

[24] J.App. 217; see also J.App. 194 ("I think the expert is going to give us the answers to all these questions"), 204 (noting the lack of "any expert testimony".)

on the basis of race, but pursuant to race-neutral selection criteria. First, the government offered a declaration of the Los Angeles Police Department officer who had initiated the investigation. The LAPD officer insisted that when the investigation of the suspected Inglewood crack ring began, he "did not know" that any of the suspects were black; he also acknowledged, however, that he did know that the "overwhelming majority of crack dealers" in that geographic area were black.[25] Second, the government offered a declaration from the ATF agent in the case, who insisted the case was "recommended for prosecution" because it met "the guidelines of the United States Attorney's Office." (J.App. 78-79). That declaration, however, neither stated what the "guidelines" were nor identified the person to whom the recommendation had been made. The ATF agent's veracity was at that point under attack in this very case.[26] Third, the government offered a declaration of the Chief of the Criminal Complaints Section, who

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[25] J.App. 75-76. Officer Campbell's September 15, 1992, declaration to this effect appears to be inconsistent with an affidavit which he had executed in April, 1992, to obtain a search warrant in this case. That affidavit stated that, when the officer was told by a confidential informant that a crack ring was being operated in Inglewood by Chris Armstrong and several others, "[y]our affiant recognized these names from a search warrant your affiant had executed on 1/17/92 . . . in Hawthorne, California. In the Hawthorne location your affiant found . . . Chris Armstrong. . . . Your affiant showed [the confidential informant] a photograph of Chris Armstrong, and [the informant] identified the photograph. . . . " Search Warrant and Affidavit, April 6, 1992, pp. 5-6.

[26] On June 10, 1992, the ATF agent, signed a statement provided to the defense in discovery asserting that he had run a check of the background of the government's key witness in this case, and that the witness had no criminal record. (Statement of

stated that the decision to bring the instant case was made because it "met the general criteria applied to all cases brought for consideration." (J.App. 80-81). The declaration, however, did not state what the criteria were; instead, it simply described seven different aspects of the instant case. Subsequently, counsel for the government suggested, somewhat equivocally, that those seven items *were* in fact the official criteria.[27]

Counsel for respondents argued that these ostensible criteria could explain neither the pattern of prosecutions nor the decision to indict the defendants in this case. They noted that a number of the defendants did not satisfy the suggested criteria.[28] They also argued that several of the purported criteria – such as use of a gun in connection with a narcotics sale, or sale by a suspect with a criminal record – were applicable to large numbers of criminal defendants who were prosecuted only in state court.[29] The trial judge concluded that the government had failed to make clear the criteria, "if there is any

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Jeffrey L. Cochran dated June 10, 1992.) On August 20, 1992, counsel for respondents subsequently introduced into evidence documents showing that the agent had actually run a check on July 13, 1992, and that the check revealed the witness had an extensive criminal record. (Defendant's Opposition to Governments' Motion for Deposition, Exhibits C, E)

[27] J.App. 170-71.

[28] J.App. 179 (respondent Martin), 183 (respondent Hampton), see also *id.* at 181 (arguing explanations of government officials were inconsistent.)

[29] J.App. 182-83 (state narcotics defendants charged with use of guns); J.App. 141, par. 7 (state crack defendants with criminal records.)

criteria, for bringing this case and others like it in Federal court"[30], and expressed concern that none of the government's declarations had indicated who had made the actual decision to commence the instant prosecution.[31]

Finally, there was an extended dispute at the December, 1992, hearing regarding whether it was feasible for the defendants themselves to obtain the data which the discovery order had required the United States to produce. First, the government argued that respondents could themselves identify all the crack prosecutions for the three years in question if they would "go sift through" a list of several thousand criminal cases which the government had produced[32]; respondents objected that the list included *all* narcotics cases, not only crack cases, and that the government was "deluging us with all of the files to look through."[33] Second, the government argued "[i]t would be a very simple matter" for respondents to identify the race of all the defendants in the listed cases[34]; respondents objected that it would be "virtually impossible" to do so, because racial identifications were not contained in the publicly available records.[35] Respondents also noted that the United States Attorneys' Office was ten times the size of the Federal Public Defender, and thus better able to identify the documents

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[30] J.App. 217.

[31] J.App. 191.

[32] J.App. 176.

[33] J.App. 189.

[34] J.App. 176.

[35] J.App. 186-87.

or produce the information at issue.[36] The district judge concluded that information about "who was prosecuted . . . and where those persons were prosecuted is within the peculiar knowledge of the Government and therefore . . . it would be this Court's position that it is the Government that would have to provide that evidence."[37] The judge also stressed that "one factor to be considered . . . is . . . that if somebody has to get the information, it would be less costly if the Government were required to provide it than if the Defendants were required to try to obtain it."[38]

(4) While this case has been on appeal, the record has to a significant degree been overtaken by events.

In 1993, under the auspices of the district court in a separate proceeding, a year long study of federal and state prosecutions was undertaken by UCLA professor Richard Berk regarding, inter alia, state crack prosecutions by the Los Angeles County District Attorney. The study identified some 8,250 charges in a twenty month period alleging sales of crack. 47% of these state charges, some 3830 in total, were against non-black defendants. Non-blacks accounted for 42% of all crack distribution arrests during this period.[39] In the court of appeals in the instant case, the United States suggested that crack dealers prosecuted in state court might in some relevant

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[36] J.App. 193.

[37] J.App. 217.

[38] J.App. 190.

[39] A summary of the study was published in R. Berk and A. Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 Fed. Sent. R. 36 (1993).

respects differ from those selected for prosecution in federal court, but did not question Berk's conclusion that there are in fact a large number of non-black crack dealers being prosecuted in state court in Los Angeles.[40]

Subsequent to the district court proceedings in the instant case, Assistant United States Attorneys have in other cases in the Central District of California made additional representations regarding the criteria which they utilize in determining when to prosecute a narcotics case in federal court. On August 6, 1993, the government asserted that membership in a gang was one of the factors considered. (Government's Opposition to Defendant's Motion to Dismiss Re: Selective Prosecution, *United States v. Washington*, CR 91-632-TJH (CDCA))[41] However, on December 13, 1993, the government disavowed that representation. (Hearing of December 13, 1993, CR 91-632-TJH)[42] Currently, it appears the government is again asserting that alleged gang affiliation is a criterion for federal prosecution. (Government's Opposition to Defendant's Motion to Compel Discovery filed October 6, 1995, *United States v. Jamar*, CR 95-432-WMB (CDCA))[43] The United States initially asserted that there were no written guidelines regarding these selection decisions. (Hearing of September 27, 1993, p. 18-33 CR 91-632-TJH), but subsequently acknowledged that there were. (Hearings of

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[40] Government's Response to Petition for Rehearing and Suggestion for Rehearing *En Banc*, pp. 13-14.

[41] See Appendix A.

[42] See Appendix A.

[43] See Appendix A.

October 28, 1993, p. 6-14 and December 13, 1993, p. 5-19, CR 91-632-TJH).[44]

In February of 1995, the United States Sentencing Commission issued a Special Report to the Congress on Cocaine and Federal Sentencing Policy. Among its conclusions regarding race and trends in cocaine use was a finding that of those reporting use of crack cocaine in their lifetime, 65% were white, 26% were black and 9% were Hispanic.[45]

SUMMARY OF ARGUMENT

(1) The discovery request in this case was for "documentary evidence or information" dealing with certain specified issues bearing on respondents' selective prosecution defense. It is governed by Rule 16(a)(1)(C), which requires the United States to provide defendants with copies of documents "material to the preparation of a defendant's defense."

The language of Rule 16 and well established discovery principles provide meaning to and significant safeguards on the document discovery available in a criminal case. Material documents may be obtained where, but only where, they relate to a genuine defense, and are not part of a fishing expedition. The genuineness of a defense can appropriately be gauged by the standard of Rule 11 of the Federal Rules of Civil Procedure, which requires absent special circumstances that factual allegations

[44] See Appendix A.

[45] *United States Sentencing Commission Special Report to the Congress: Cocaine and Federal Sentencing Policy* at 39. (February 1995)

"have evidentiary support." Discovery under Rule 16(a)(1)(C) can appropriately be limited to such claims.

The determination of whether there is an evidentiary basis for the defense on which a discovery request is grounded is a factual question to be made in the first instance by the district court, and can be overturned on appeal only for clear error. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Discovery decisions by a district judge may be reversed only for a demonstrable abuse of discretion.

(2) These general principles, not any special per se discovery rule, govern discovery requests related to a defense of selective prosecution. Rule 16 does single out certain types of discovery for special treatment, but discovery concerning selective prosecution is not among them. The courts are not free to engraft onto Rule 16 additional exceptions to its otherwise general language. *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 113 S. Ct. 1160 (1993).

The contours of the special discovery rule proposed by the United States are far from clear. The government refers to its proposal, variously, as requiring a "substantial and concrete basis", "solid credible evidence", "reasonable likelihood", a "substantial threshold showing", and "concrete[ness]." Adoption by this Court of such an ill-defined special standard will generate increased uncertainty and litigation. District judges have ample authority under the principles applicable to all Rule 16 discovery requests to prevent unwarranted or unduly burdensome discovery with regard to selective prosecution or any other defense.

(3) Unconstitutional selective prosecution can occur even where all or virtually all of the individuals who violate a particular statute are members of the same racial group. Government officials may not single out a particular offense for harsher penalties or more vigorous investigation or prosecution *because* those who commit that violation are likely to be members of a single minority group. *Hunter v. Underwood*, 471 U.S. 222 (1985).

The Equal Pay Act is narrowly framed to prohibit intentional discrimination only where there are men similarly situated to the female plaintiffs. But the guarantees of equal protection embodied in the Fifth Amendment, like the unrestricted prohibition of intentional discrimination in Title VII, apply to all invidiously motivated actions, regardless of whether there is a male or non-minority comparator. *County of Washington v. Gunther*, 452 U.S. 161 (1981).

In *Wayte v. United States*, 470 U.S. 598 (1985), the Solicitor General previously urged adoption of a "similarly situated" requirement for selective prosecution cases, but this Court properly declined to utilize that standard.

(4) The district judge did not abuse her discretion in ordering the limited discovery at issue in this case.

Counsel for respondents clearly had a colorable basis for asserting a defense of selective prosecution. A study by the Federal Public Defender revealed that all crack cases closed by that office in a one year period involved black defendants. The United States does not contend that there was some obvious and incontrovertible innocent explanation for that pattern. Several months after the

study was submitted, counsel for the government acknowledged that it then had "no explanation" for the results.[46]

The United States does not question the materiality of the information sought in the discovery request, and raises no issue regarding the scope of that order. The government argued below that it would have been preferable for the district judge to subpoena information from California officials, rather than requiring the United States to produce documents or information. But this is precisely the sort of discovery management issue consigned to the discretion of the district courts.

ARGUMENT

Certain basic principles bearing on the instant appeal are not in dispute. "The decision to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.' " (U.S.Br. 17). The Solicitor General does not, of course, argue that discovery can never be ordered with regard to a claim of selective prosecution, and has not chosen to raise in this Court any question about the scope of the particular discovery ordered by the district court. The government appears to acknowledge that any limitations on discovery should "still allo[w] meritorious claims to proceed." (U.S.Br. 25-26) The parties are in agreement that here, as in any civil or criminal case, the decision of a district judge to order discovery may be overturned on appeal only if

[46] J.App. 150.

there has been a demonstrable abuse of discretion. (U.S.Br. 36-37).

The government, although opposing a discovery order directed to the United States, consistently maintained in the courts below that the district judge in this case *could* properly have issued a subpoena to California officials directing them to produce information about cocaine base dealers prosecuted in state court.[47] The United States also agrees that discovery may be ordered, either on a sufficient showing of dissimilar treatment of "similarly situated" individuals or where there are "direct admissions by officials of discriminatory purpose." (U.S.Br. 15). The question presented is whether these uncontroverted areas of judicial authority mark a rigid boundary beyond which district judges are powerless to inquire whether an investigation or prosecution was animated in whole or part by an unconstitutional purpose.

I. DEFENDANTS ARE ENTITLED TO DISCOVER EVIDENCE MATERIAL TO A DEFENSE OF SELECTIVE PROSECUTION

(1) This case concerns the scope of and procedure applicable to Rule 16(a)(1)(C) of the Federal Rules of

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[47] Government Motion for Reconsideration of Order for Discovery, p. 14 ("information is . . . accessible to defendants by subpoena to local authorities"); J.App. 201 ("Defense Counsel- . . . have as much opportunity as the Government possibly could to subpoena information from the state system"); Government Response to Petition for Rehearing and Suggestion for Rehearing *En Banc*, p.6 n. 4 ("defendants in this case could have pursued subpoenas to obtain state law enforcement records.")

Criminal Procedure. In terms modeled after Civil Rule 34(a), Rule 16 provides that a criminal defendant may inspect and copy any papers or documents "which are material to the preparation of the defendant's defense." Rule 16(a)(1)(C) does not require a defendant to obtain a court order in order to discover such material, but imposes on the government an obligation to "permit the defendant to inspect and copy" any documents within the scope of the Rule. The discovery request at issue in this case was expressly for "documentary evidence or information."[48]

Provision for discovery of documents in criminal cases has existed since the initial promulgation of the Federal Rules of Criminal Procedure. The judicial practice of providing a defendant with access to documents prior to trial dates back to *United States v. Burr*, 25 Fed. Cas. 30 (1807) (Marshall, C.J.). The scope of Rule 16 has been repeatedly broadened because of the Advisory Committee's "view that an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration." (Notes of Advisory Committee to 1974 Amendments).

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[48] A number of documents in the government's possession were obviously within the scope of the request. The actual indictments in federal crack cases would have identified the defendants in those cases; the race of a defendant is indicated in FBI arrest reports, Bureau of Prisons forms, and his or her NCIC Record of Arrests and Convictions, a normal component of the discovery provided by the government in any criminal case. The criteria utilized by the United States Attorney in selecting cases for federal prosecution are set out in a written guideline. *See* p.13, supra.

> [A] system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases . . . is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system.

Wardius v. Oregon, 412 U.S. 470, 473-74 (1973). Rule 16 does not constrict the inherent authority of federal judges to order prosecutors to provide discovery or otherwise disclose information which justice requires be made available to a defendant. *Jencks v. United States*, 353 U.S. 657 (1957).

Rule 16(a)(1)(C) complements Rule 17(c), which authorizes a defendant to subpoena for presentation at either trial or a Rule 12(b) hearing books, papers or documents. Although the scope of the two rules is in some respects different, Rule 16 permits a defendant to examine and evaluate documents which he may then choose to subpoena. At a hearing on, for example, a claim of selective prosecution, a Rule 17 subpoena is available to obtain appropriate documents. Although Rule 17(c) contains no express requirement that documents be "material", the Rule's prohibition against "unreasonable" subpoenas is understood to encompass a requirement that the materials sought be "relevant". *United States v. Nixon*, 418 U.S. 683, 699-700 (1974).

The discovery authorized by Rule 16 would in certain instances be constitutionally required. *Brady v. Maryland*, 373 U.S. 83 (1963), mandates disclosure by the prosecution of "evidence favorable to an accused . . . that, if disclosed and used effectively, . . . may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 687, 676 (1985). Evidence which would lead a court to sustain a selective prosecution defense, thus preventing not only conviction but the risks of trial, obviously is exculpatory in nature. The government's disclosure obligation under *Brady* is greater when a defendant has made an express request for material. *Id.* at 681-82. The Compulsory Process Clause of the Sixth Amendment is generally available to provide "production of evidence needed . . . by the defense." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988)[49]. The inherent obligation of the federal courts to ensure that their actions and orders do not violate the Constitution encompasses the authority and at times an obligation to conduct a factual inquiry necessary to assure, for example, that a defendant has not been selected for prosecution or for imposition of a heavier punishment because of his race.

(2) Rule 16(a)(1)(C) is not, of course, a blanket authorization to defense counsel to browse through the files of the Department of Justice. The only documents which can be obtained are those "which are material to the preparation of the defendant's defense." Where defense counsel has reason to believe that a particular defense may be available to his or her client, Rule 16(a)(1)(C) is available to obtain relevant information in the hands of the government. But Rule 16 cannot be

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[49] "This court would certainly be very unwilling to say that upon fair construction the constitutional . . . right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence." *United States v. Burr*, 25 Fed. Cas. 30, 35 (1807) (Marshall, C.J.).

utilized by defense counsel to rummage through government files on the off chance that some additional defense may turn up; such an inquiry would be the sort of fishing expedition prohibited by criminal and civil discovery principles alike. Discovery under Rule 16 is not permissible with regard to a defense which a defendant "has never alleged, much less claimed to have evidence tending to show" exists. *Wade v. United States*, 504 U.S. 181, 186 (1992).

The genuineness of a defense for which discovery is sought in a criminal proceeding can be assessed by the same objective standard utilized to determine the genuineness of other defenses or claims. The factual allegations underlying an asserted defense must "have evidentiary support or, if specifically so identified, [be] likely to have evidentiary support after a reasonable opportunity for . . . discovery." Rule 11(b)(2), Fed. Rules of Civ. Pro. Where the information already available to a defense attorney is "sufficient to lead a reasonable person to believe . . . that further inquiry on the subject is warranted" (Pet. App. 97a), discovery under Rule 16(a)(1)(C) is among the tools which, where otherwise appropriate, may be utilized to pursue that inquiry.

The government may resist any discovery request which it can show is no more than a fishing expedition. Where the United States declines on this basis to produce a document sought under Rule 16(a)(1)(C), a court called upon to resolve the ensuing discovery dispute can and should inquire whether the purported defense to which the document relates is a genuine one. In making that determination, a number of lower courts, and all members of the court below, have suggested with regard to a

selective prosecution defense that there must be a "colorable basis" for asserting that defense before discovery will be allowed. (Pet. App. 7, 19-21). The underlying question with regard to discovery regarding a selective prosecution defense is the same as for any other defense – whether the information available to defense counsel is sufficient to lead a reasonable attorney to conclude that further inquiry on the subject is warranted.

Even where a genuine defense is at issue, significant constraints may limit the scope, and even the availability of discovery. Any document sought must be "material" to the asserted defense. Under Rule 16, as with any discovery request, a court may consider whether the party seeking discovery already has reasonable access to the material at issue; the comparative accessibility of a document to the respective parties is of palpable importance. Rule 2 requires a federal judge to implement any discovery in a way that minimizes cost and delay, focusing discovery on those items most readily available and likely to lead most quickly to a resolution of the underlying defense.

In any case in which discovery is sought under Rule 16(a)(1)(C), the government may have a legitimate interest in protecting from disclosure some or all of the information in the documents in question. Even where that interest falls short of a legal privilege, see *Hickman v. Taylor*, 329 U.S. 495 (1947), this is a consideration which a court can and should consider in responding to discovery requests. In some instances, it may be appropriate to subject documents to a protective order, to provide only redacted copies of the documents, or for the district judge to review the materials in camera to ascertain what, if

anything, in them actually bears on the defense for which they are sought. Where a party seeking such sensitive discovery has not exhausted other sources of information, a district judge has discretion to deny discovery until the defendant has done so. In addressing such discovery issues, a district court should balance the importance of the government's legitimate need for confidentiality with the defendant's right to prepare and present a defense. See *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring); *Kerr v. United States District Court*, 426 U.S. 394, 405 (1976); *United States v. Nixon*, 418 U.S. 683, 711 (1974). One useful method of doing so may be by controlling the order in which discovery is permitted, initially allowing the form of discovery that is least burdensome, and evaluating the propriety of further discovery when the result of that first inquiry is known.

(3) Requests for discovery must ordinarily be addressed in the first instance by the district court. Where, after affording the parties a full and fair opportunity to be heard, the district judge fashions a practical solution to the discovery issues presented by a selective prosecution defense, several distinct considerations warrant considerable deference to that decision.

First, resolution of discovery issues "must necessarily be committed to the sound discretion of the trial court since the necessity for the [discovery] most often turns upon a determination of factual issues." *United States v. Nixon*, 418 U.S. 683, 702 (1974).

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Anderson v. Bessemer City, 470 U.S. 564, 574 (1985). To the extent that a district court's decision turns on an assessment of the credibility of the prosecutor's explanation of his actions, its findings are entitled to particular deference. *Batson v. Kentucky*, 476 U.S. 79, 98 n. 21 (1986); see *Hernandez v. New York*, 500 U.S. 352, 364-66 (1991).

Second, the resolution of discovery issues often goes to the heart of a trial judge's responsibility under Rule 2 to manage the pretrial process with a minimum of cost and delay. "Discovery questions are ordinarily reviewed for abuse of discretion." *United States v. Bourgeois*, 964 F. 2d 935, 937 (9th Cir. 1992). These determinations often turn on intensely practical considerations, the interrelation of known and sought after information, the comparative accessibility of information to the various parties, and possible alternative methods of resolving a particular factual dispute. "The exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties." *Société Nat. Ind. Aéro. v. United States District Court*, 482 U.S. 522, 546 (1987).

Third, the issues raised by a claim of selective prosecution by a particular prosecutor's office will often be within the particular experience and expertise of a federal district judge who sits in the district at issue, and can draw on his or her "own day-to-day observations." *United States v. Redondo-Lemos*, 955 F. 2d 1296, 1302 (9th Cir. 1992).

> District judges are uniquely situated to observe possible discrimination in the government's charging decisions. They have much more experience with the policies and practices of the United States Attorney in their district than do [appellate judges], and they are obviously in a better position to observe a pattern of discrimination than are individual defendants.

(Pet. App. 86a).

Fourth, a district judge will bring to a selective prosecution dispute an understanding of local circumstances that will at times be important to an evaluation of the competing arguments and evidence. In this Court, the government advances a necessarily generalized argument about whether it would be reasonable to assume that crack is sold in Los Angeles by non-blacks. (U.S.Br. 13-14, 29-30). A district judge who actually lives in Los Angeles, and is familiar with the patterns of drug use in that area, is far better situated to engage in an assessment of such arguments, involving as they do "a blend of history and an intensely local appraisal" of the issues. *White v. Regester*, 412 U.S. 755, 769 (1973).

II. NO SPECIAL STANDARDS ARE NECESSARY OR APPROPRIATE IN RESOLVING DISCOVERY REQUESTS RELATED TO, OR THE MERITS OF, A SELECTIVE PROSECUTION DEFENSE

A. General Discovery Principles Adequately Protect the Government from Improper Discovery

Not content with these general safeguards on the use of discovery in a criminal proceeding, the United States asks this Court to adopt a special, more stringent rule

applicable only to discovery related to selective prosecution issues. The sole practical effect of such a special rule would be to bar discovery in circumstances which otherwise satisfy the normal standards of materiality and reasonableness of scope.

The government's suggestion that this Court fashion such a special rule cannot be squared with the language of Rule 16. The arguments that the government advances for such a rule – delay, risk of abuse, potential intrusiveness – could be made to some degree with regard to any material sought by a criminal defendant. Rule 16 *does* impose special discovery limitations with regard to three specific types of evidence. First, Rule 16(a)(2) exempts from disclosure "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case." Second, Rule 16(a)(2) sharply limits the availability of "statements made by government witnesses or prospective government witnesses"; the timing and availability of that material is regulated with specificity by the Jencks Act. 18 U.S.C. § 3500. Third, Rule 16(a)(3) precludes discovery of grand jury records save in certain specified circumstances. Thus here, as in *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, ___, 113 S. Ct. 1160 (1993), "the Federal rules do address in Rule [16] the need for" limiting discovery of certain government materials, "but do not include among the enumerated [limitations] any reference to" evidence related to selective prosecution claims. 507 U.S. at ___, 113 S. Ct. at 1161. The lower courts have repeatedly and correctly rejected similar

efforts to engraft onto Rule 16 exceptions not explicitly contained in the language of that Rule.[50]

The government urges this Court to hold that discovery in selective prosecution cases should be limited to "rare" circumstances. (U.S.Br. 26). The framers of the Rules of Criminal Procedure, however, knew how to craft such a discovery rule where they wished to do so; Rule 15(a) utilizes just such a standard in limiting depositions to "exceptional circumstances." No such restriction, however, is contained in Rule 16. *"Expression unius est exclusio alterius." Leatherman*, 507 U.S. at ___, 113 S.Ct. at 1161. However persuasive the government's arguments might be if advanced in support of proposals to amend Rule 16, they are insufficient to explain why this Court should simply read into that Rule exceptions not found in its very specific language.

Although the substance of the government's proposed special standard is quite obscure, the United States clearly contemplates that, prior to any discovery regarding selective prosecution, there would in each case be an evidentiary hearing before the district court; at that hearing the defendant would put on evidence which the government would have an opportunity to rebut, and the court would then determine whether and what discovery

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[50] *United States v. Scafe*, 822 F. 2d 928, 935 (10th Cir. 1987) ("The language of the rule reflects no intention that it be restricted to statements to be used in the government's case in chief and we reject that restrictive interpretation of the rule."); *United States v. Caldwell*, 543 F. 2d 1333, 1352-53 (D.C.Cir. 1974) ("we are unable to detect in this language [of Rule 16] the limitation the government suggests.")

should occur. Only if the defendant prevailed at this mini-trial of his selective prosecution claim would discovery be ordered by the district court. *Cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). Precisely because Ninth Circuit caselaw embodies just such a rule, discovery regarding selective prosecution must in practice be initiated by motion; in the Central District of California it is only in civil cases that parties are required by the local rules to request and negotiate discovery issues before referring the matter to the district court.[51] But this practice recreates the very process which the Rules were amended in 1974 to abolish, resort to the court in the first instance.[52]

Although the United States is emphatic in arguing for a special discovery standard in selective prosecution cases, it is far from clear what that standard is, or in what cases the government intends its standard to lead to a result different than that which would ordinarily apply

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[51] Local Rules, C.D.Cal., Civ. Rule 7.15.

[52] Prior to 1974 a defendant was required to obtain a court order in order to obtain discovery in a criminal case. In recommending a change in this awkward practice, the Advisory Committee explained: "The language of the rule is recast from the 'court may order' or 'the court shall order' to 'the government shall permit' or 'the defendant shall permit.' This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable. . . . " The language of Rule 16 is in contrast with Civil Rule 35(a), which permits discovery of the physical or mental condition of an individual only by court order. *Schlagenhauf v. Holder*, 379 U.S. 104 (1965).

under Rule 16. The Solicitor General describes his proposal, variously, as a "substantial and concrete basis" (U.S.Br. 12, 19, 21, 25), "solid credible evidence" (*id.* at 12, 24), "reasonable likelihood" (*id.* at 25), "substantial threshold showing" (*id.* at 12, 20, 20 n. 1), "concrete" (*id.* at 21, 25, 29), "reasonable grounds" (*id.* at 26), and less than a prima facie case. *Id.* at 25. None of these alternative formulations seems likely to provide useful guidance to district judges faced with the eminently practical problems of supervising discovery, or to appellate courts asked to decide whether a district court abused its discretion. Rather, adoption by this Court of any of these vague admonitions would inevitably engender increased uncertainty and litigation regarding when discovery should and should not be permitted.

The government argues that without some special per se rule defendants raising selective prosecution claims would be able to "circumvent" the materiality requirement of Rule 16 (U.S.Br. 20 n.1), and would succeed in embarking on "needless" and "unwarranted" "fishing expedition[s]" leading to discovery of "irrelevant and immaterial" information. (U.S.Br. 12, 20, 25). But there is no reason to believe that district judges, who every day deal competently with discovery issues in civil as well as criminal cases, would somehow be incapable in selective prosecution claims of separating frivolous from legitimate discovery requests. Federal district courts have for decades been alert to the inappropriateness of unwarranted fishing expeditions; surely litigious anglers will not run amok merely by asserting a claim of selective prosecution. Doubtless there have been and will continue to be disputes under Rule 16 raising difficult factual and

practical issues, but the Rules clearly contemplate that those problems be addressed on a case by case basis.[53] The proposed per se prophylactic rule advocated by the government for an entire category of cases is inconsistent with the case specific determinations contemplated by Rule 16.

The government also argues that without a special discovery limitation there may be "abuses" (U.S.Br. 19), including "highly intrusive" (*id.* at 20) or "massive" (*id.* at 20 n. 1) discovery or discovery resulting in, or even intended to produce, unwarranted "delay". (U.S.Br. 17, 19, 20, 20 n.1, 25). Again, however, all of these are concerns that routinely arise with regard to any civil and criminal discovery; the government does not claim that such issues are more common or intractable when the evidence sought relates to selective prosecution. Here, as with any other claim or defense, the Court can ordinarily "be confident that the district court will not let discovery get out of hand." *United States v. Adams*, 870 F. 2d 1140, 1146 (6th Cir. 1989). In at least some circumstances, moreover, the discovery limitation proposed by the United States would increase rather than reduce delay. The United States, for example, maintains a computer list of all narcotics prosecutions in the Central District of California; the same information could be obtained by defense counsel by manually reviewing every criminal

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[53] Rule 16(d)(1) provides in part: "Upon a sufficient showing the court may at any time order that the discovery . . . be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone."

file in the office of the District Court Clerk. To deny discovery of that computer list would obviously increase greatly the delay involved in resolving a selective prosecution claim.

The government offers no reason, moreover, why these concerns should result in the denial of discovery in *this* case. The Solicitor General has not challenged the scope of the particular discovery order in this case; he does not object that the particular information sought is excessive, irrelevant, unduly intrusive, or requested for purpose of delay. In the absence of any claim that the scope of the discovery ordered in this case is inappropriate, it makes little sense to suggest that that discovery order should nonetheless be overturned because of the possibility that discovery orders in some other case may be unduly burdensome or intrusive.

The Solicitor General urges this Court to forbid a federal judge, absent special circumstances, from raising on his or her own any questions, or seeking any information, about whether a criminal prosecution in his or her court has been undertaken for racial or other unconstitutional reasons. "[J]udicial inquiry into a prosecutor's reasons for bringing a prosecution should not even begin unless there is a substantial and concrete basis for suspecting unconstitutional action." (U.S.Br. 19). On the government's view, it would have been impermissible for the district judge in this case even to inquire of the attorney for the United States why the instant prosecution had been filed in federal rather than state court, or why there appeared to be few if any non-black defendants in federal cocaine base prosecutions. If the Solicitor General is correct, a United States Attorney could and perhaps should

flatly refuse to answer such a question, instead admonishing the judge that the government would respond only if the judge could first produce "substantial and concrete" evidence of prosecutorial misconduct. Such a rule could all too easily require a federal judge to be a witting participant in a serious constitutional violation.

Where, as here, the discretionary decision of a single government official may well result in defendants in their early 20's with minimal records and involvement spending 35 years to life in jail, such a bar to judicial scrutiny would confer on an Assistant United States Attorney a power not unlike the infamous lettres de cachet of eighteenth century France.[54] The broader interest of the United States, we urge, lies instead in ensuring compliance with the commands of the Constitution, even at the cost of some occasional inconvenience. Where a district judge entertains suspicion of invidious racial discrimination by the government, strict, not non-existent, judicial scrutiny is required. As Judge Kozinski observed:

> Where a district judge detects what he suspects may be an error seriously affecting the rights of a criminal defendant, he *must* address the problem.

United States v. Redondo-Lemos, 955 F. 2d 1296, 1298 (9th Cir. 1992). The original panel decision below, on which the government otherwise relies, properly insisted that a federal judge could initiate an appropriate inquiry whenever "the district court develops a suspicion of unconstitutional conduct." (Pet. App. 74a).

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[54] *See* J.App. 179, 182-83, 193.

The government suggests that discovery regarding selective prosecution claims should be severely limited because there is a presumption that federal officials do not violate the Constitution. (U.S.Br. 18-19). But "[i]t is appropriate to judge selective prosection claims according to ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985). No such constraint on discovery exists where a capital defendant asserts that a federal prosecutor exercised peremptories on the basis of race in a particular case. *Batson v. Kentucky*, 476 U.S. 79 (1986)[55] *Batson* expressly rejected the reasoning of *Swain* that a prosecutor might defend an equal protection claim merely by "relying on a presumption that he properly exercised the State's challenges." 476 U.S. at 91. It is undeniable that the government enjoys broad discretion in determining which prosecutions to bring, but the Solicitor General properly concedes that that discretion cannot be exercised on the basis of race. Judicial solicitude for legitimate exercises of that discretion cannot provide a basis for limiting inquiry into *whether* the exercise in a particular case was in fact an impermissible one.

In framing a particular discovery order, a district court can and should consider the degree to which its terms might inappropriately chill legitimate prosecutorial activity, just as a court would consider whether a grand jury subpoena might chill, for example, constitutionally protected free speech. *Herbert v. Lando*, 441 U.S. 153, 179

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[55] *See* U.S.Br. 21 (claim of unconstitutional discrimination in refusal of prosecutor to file motion for reduced sentence "should be treated no differently from a prosecutor's other decisions.")

(1979) (Powell, J., concurring). But in this case the government did not argue below, and does not insist here, that the particular discovery order at issue presents such a threat. Indeed, the government insisted below that most of the information sought was already a matter of public record. Only evidence that a particular request is likely to have a chilling effect, not a "generalized claim of confidentiality", is sufficient to raise questions about the appropriateness of a particular discovery order. *United States v. Nixon*, 418 U.S. 683, 711, 713 (1974). The government represented to the court below that it would probably open a *criminal* investigation if there were "the slightest indication that a[n Assistant U.S. Attorney] in our office, or an agent or officer with whom we were dealing, had charged a case, or prosecuted a case, or arrested an individual for racial reasons."[56] In cases in which government officials already face a threat of criminal prosecution, the possibility of disclosure of information in a collateral criminal case is unlikely to have even a marginal additional chilling effect.

The Solicitor General suggests that special limitations on discovery related to selective prosecution is needed to avoid, save in "rare" cases, disclosure of evidence in the possession of the government which may bear on such claims. (U.S.Br. 26) In the lower courts, however, it is the frequent practice of the United States to oppose discovery motions by selectively disclosing to the court, on its own initiative, government evidence which the United States Attorney believes likely to persuade the court to deny the

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[56] J.App. 197.

motion[57]. In the instant case, for example, the government proffered declarations about the charging decision in this case, a documentary analysis of narcotics use and sales, and a lengthy list of federal narcotics prosecutions, in a candid effort to "short circui[t] the discovery issue."[58] The United States offered similarly selected evidence in *Wayte v. United States*, 470 U.S. 598, 504 (1985). Thus the practical question raised by these cases is not whether the government can shield *all* its information from discovery, but whether it can defeat a discovery request by selectively disclosing to the court only the evidence which tends to show that discovery is not appropriate. In some cases, of course, the court may find that showing persuasive, but in other instances a court might sensibly be induced to order discovery because of the nature of the information the government had chosen to withhold, or because of the unpersuasiveness of what may well have been the government's best evidence. In general, "more accurate results will be obtained by placing all, rather than part, of the evidence before the decision maker." *Herbert v. Lando*, 441 U.S. 153, 173 (1979).

We do not question the earnestness of the government's concern that excessive and unwarranted discovery could impose "high costs on the criminal justice system".

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[57] E.g., *United States v. Gomez-Lopez*, 62 F. 3d 304, 305 (9th Cir. 1995); *United States v. Fares*, 978 F. 2d 52, 58 (2d Cir. 1992); *United States v. Bourgeois*, 964 F. 2d 935, 940 (9th Cir. 1992); *United States v. Penagaricano-Soler*, 911 F. 2d 833, 836-37 (1st Cir. 1990); *United States v. Aguilar*, 883 F. 2d 662, 708 (9th Cir. 1989); *United States v. Greenwood*, 796 F. 2d 49, 52 (4th Cir. 1986); *United States v. Holmes*, 794 F. 2d 345, 348 and n. 3 (8th Cir. 1986).

[58] J.App. 172.

(U.S.Br. 17) But "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts. . . . " *United States v. Nixon*, 418 U.S. 683, 709 (1974). The Solicitor General properly recognized a decade ago that

> [n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability.[59]

"In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law", *Batson v. Kentucky*, 476 U.S. at 99, are imperiled by the appearance of racial discrimination in that system.[60] In the United States today public confidence in the racial fairness of the criminal justice system is already badly shaken; in Los Angeles that confidence has virtually collapsed. When a large portion of the population believes that system is seriously tainted by racial discrimination, the public cooperation on which the system depends – from witnesses as well as jurors – is at risk. The facts which prompted the instant discovery request –

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[59] Brief for United States, *Wayte v. United States*, No. 83-1292, p. 22 (quoting *United States v. Berrios*, 501 F. 2d 1207, 1209 (2d Cir. 1974)).

[60] "Everyone concerned with the legitimacy of the criminal justice system – and with the willingness of all citizens to accept its judgment as fair and final – must be troubled by allegations of unfairness, particularly racial discrimination." U.S. Sentencing Commission, *Materials Concerning Sentencing for Crack Cocaine Offenses*, 57 Crim. Law. Rep. 2127, 2131 (May 31, 1995).

that all or virtually all defendants prosecuted for cocaine base sales by federal authorities are black – is not some state secret; a randomly selected pedestrian at the corner of Florence and Normandie in South Central Los Angeles could have accurately predicted the result of the Federal Public Defender's study. The continued resistance of the Department of Justice to full and fair discovery and public hearing on such issues will in the long term impose on the criminal justice system a cost immeasurably greater than the passing inconvenience of responding to a discovery request.

B. Proof of the Existence of "Similarly Situated" Non-Minorities Is Not a Necessary Element of a Selective Prosecution Defense

(1) The criminal justice system, necessarily and properly, is permeated by circumstances affording, and often requiring, law enforcement officials to make choices. The police officer walking a beat decides daily what infractions to pursue, and which in prudence should be overlooked. Federal or state task forces select particular geographic neighborhoods to target for investigation. Authorities may focus on particularly visible criminal activity, or pursue covert but possibly more far reaching conspiracies. Officials who come across a drug dealer may opt for an immediate arrest, or try to arrange for larger sales which will lead to far increased penalties. Where, as is often the case, the same criminal act violates both federal and state laws, federal officials must select those defendants against whom federal charges will be filed, and which suspects should be left to state authorities. All of these selections, if properly made, may

enhance the overall effectiveness of law enforcement; but any of these decisions, if made on the basis of race, would be unconstitutional.

One manner in which law enforcement officials could discriminate would be by making improper distinctions among defendants with identical criminal histories who had committed the very same crime. Thus Equal Protection would clearly be violated if the government were, for racial reasons, to target or prosecute blacks who sold more than 50 grams of crack, while ignoring whites who sold the same quantity of the same drug. E.g., *United States v. Gutierrez*, 990 F. 2d 472, 477 (9th Cir. 1993) (claim that government intentionally "targeted predominantly black and hispanic neighborhoods.")[61] But clearly that is not the *only* method in which invidious discrimination can occur. If in a particular locality cocaine base were actually used and sold only by blacks, while cocaine powder were used and sold only by whites, the Constitution would certainly be violated if the government, for racial reasons, prosecuted even low level crack dealers but only major powder distributors, chose to target its investigations at crack violations, or made a greater effort to induce crack dealers to sell large quantities to federal agents. Equal protection principles preclude the government from targeting a particular type of criminal act for greater scrutiny, harsher penalties, or more vigorous prosecution *because* most or all of the individuals who

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[61] *See United States v. Bishop*, 959 F. 2d 820, 825-26 (9th Cir. 1992) (equal protection violated by peremptory challenge based on ethnic composition of neighborhood in which prospective juror resides).

commit that offense are racial minorities. *See Hunter v. Underwood*, 471 U.S. 222, 226-32 (1985).

As these examples illustrate, unconstitutional discrimination can certainly occur even though all the individuals who violate a particular statute, or who do so in a particular manner, may belong to a single racial or ethnic group. Even if Christopher Lee Armstrong were the only person ever suspected of selling crack in the Central District of California, federal officials would undeniably violate the Constitution if they targeted, investigated, arrested, or selected him for prosecution because he was black or Catholic or a Republican.

(2) The government suggests that the existence of "similarly situated" whites is a necessary element of a selective prosecution claim. This argument erroneously confuses one possible method of *proving* intentional discrimination with the nature of intentional discrimination itself.

As this Court has repeatedly held, what equal protection prohibits, absent a compelling governmental interest, is governmental action taken on the basis of race. *Washington v. Davis*, 426 U.S. 229 (1976). The pivotal issue in such a discrimination case is the motive of government official or officials involved. Often, of course, one of the most useful evidentiary tools for discerning motive is a comparison of the treatment of similarly situated minority and non-minority individuals. Thus, where voting officials apply a literacy test with draconian harshness to black citizens, rejecting even those with college degrees, while happily registering comparable or even less educated whites, the invidious motive at work will be

entirely obvious. *Louisiana v. United States*, 380 U.S. 145, 153 (1965). But that assuredly is not the only type or method of proving discrimination. The Constitution forbids a state registrar from rejecting even a single black registrant on the basis of race, even if his or her particular background be totally unique, or from adopting a particular racially neutral practice because, even though applied equally to "similarly situated" blacks and whites, it would fall more harshly on racial minorities. *Hunter v. Underwood; Harman v. Forssenius*, 380 U.S. 528, 543-44 (1965).

This distinction is a familiar one in employment discrimination litigation. Federal anti-discrimination laws forbid employers to discharge an employee because of his or her race. Where a discharged employee contends that he or she was the victim of unlawful discrimination, one method of establishing that claim would be to show that another employee, of a different race, was treated more leniently despite having committed the identical offense. *See, e.g., McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 275, 278 (1976). But federal law also protects from race-based dismissals workers whose positions, circumstances or alleged transgressions happen to be unique. *See, e.g., St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). Similarly, under *Batson v. Kentucky*, 476 U.S. 79 (1986), a defendant need not show that a prospective juror allegedly removed on the basis of race was "similarly situated" to some white juror; the background and circumstances of individual jurors is almost always to some extent unique.

It would, of course, be possible to frame a law which expressly permitted intentional discrimination in the

absence of "similarly situated" comparators. The Equal Pay Act is just such a statute, prohibiting gender based wage discrimination against women only where there are men performing for higher wages "*equal* work on jobs the performance of which requires *equal* skill, effort, and responsibility, and which are performed under *similar* working conditions." 29 U.S.C. § 206(d)(1) (Emphasis added). Thus where only women work in "a unique position", the Equal Pay Act does not prohibit an employer from setting a low wage for that position because it harbors animus towards female workers. *County of Washington v. Gunther*, 452 U.S. 161, 179 (1981). Even in the absence of any similarly situated men, however, that same act would violate Title VII, whose prohibition against intentional discrimination, like the Constitution, contains no such limitation. *Id.*

Adoption of the government's proposed rule would lead at times to incongruous results. If, for example, a prosecutor adopted a racially motivated practice of prosecuting even small time non-white drug dealers, while charging only those whites who were major dealers, whether the conviction of a particular small time non-white dealer was unconstitutional would depend on what types of drugs happened to be sold by whites in the area. Thus, the convictions of minority powder cocaine or methamphetamine dealers might be invalid, while the convictions of minority crack or black tar heroin dealers would be perfectly constitutional. *See County of Washington v. Gunther*, 452 U.S. at 179.

This Court has previously rejected the United States' suggestion that the selective prosecution defense be limited to cases in which there were "similarly situated"

individuals receiving more lenient treatment. In *Wayte v. United States*, 470 U.S. 598 (1985), the lower courts had imposed on selective prosecution defenses a two-part standard, requiring both proof of an unconstitutional animus and proof that there were others "similarly situated" who had not been prosecuted. 470 U.S. at 605-606. The Solicitor General urged this Court in *Wayte* to adopt that same special standard[62]. This Court refused to do so, instead utilizing the requirement of "ordinary equal protection standards" which require a defendant to show "a discriminatory effect and . . . a discriminatory purpose." 470 U.S. at 608. This Court's rejection of the proposed requirement of differing treatment of "others similarly situated," in favor of a broader standard of "discriminatory effect," reflected an understanding that discrimination might occur against an individual or group of individuals whose particular situations were not similar to anyone else's.

This Court's decision in *Ah Sin v. Wittman*, 198 U.S. 500 (1905), does not support the government's position. The petition for writ of habeas corpus in that case contained no allegation of *any* invidious motive on the part of local officials, nor any claim that the statute at issue

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[62] Brief for the United States, No. 83-1292, pp. 23-29. The government urged this Court to hold that proof of similarly situated unprosecuted individuals was an essential "prong" of a selective prosecution claim, *id.* at 26, and that absent proof of that prong it would be improper for a court even to inquire whether a particular prosecution was the product of an invidious motivation. *Id.* at 26.

was adopted[63], enforced, or enforced with particular vigor because those likely to violate the law were primarily Chinese. The sole allegation of the petition – that Chinese persons alone had been prosecuted under the ordinance – asserted neither the existence of a discriminatory purpose nor the existence of a discriminatory effect. Applying a stringent pleading requirement quite unlike the standards subsequently adopted by the Federal Rules, this Court in 1905 held that that single allegation was insufficient. 198 U.S. at 507-08. Although *Ah Sin* indicated the petition would have been sufficient if it had also contained an allegation that there were non-Chinese offenders who went unprosecuted, the Court did not suggest that this was the only additional allegation which would have remedied the defect in that pleading.[64]

(3) To the extent that a defendant argues that improper invidious distinctions were made within a particular group of offenders, such as crack dealers, the comparative treatment of other members of that group

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[63] At the time *Ah Sin* was decided, the decisions of this Court precluded Ah Sin from advancing any challenge to the purpose of the law at issue. See *Palmer v. Thompson*, 403 U.S. 217 (1971); *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *McCray v. United States*, 195 U.S. 27, 56 (1904).

[64] The ordinance in *Ah Sin* in essence forbade the possession of cards, dice or dominoes behind locked doors. It is entirely inconceivable that no white persons engaged in such behavior in the rambunctious society of turn of the century San Francisco. Were the government today to attack the sufficiency of a pleading by hypothesizing the possibility of such white fastidiousness in the aptly labeled Wild West, that argument would be dismissed as an "ingenious academic exercise in the conceivable." *Warth v. Seldin*, 422 U.S. 490, 509 (1975).

would of course be important evidence. A district court clearly should consider that element in resolving this type of selective prosecution defense on the merits, and undeniably could do so in deciding whether to order discovery. The government urges this Court to go further and announce a rigid rule that discovery cannot be ordered in such a case unless there is either substantial evidence as to the composition of the group of violators not prosecuted, or a confession by the United States Attorney that the prosecution decision was the result of invidious discrimination. (U.S.Br. 15). In the latter case, of course, there would be no need for discovery; such a confession alone would require dismissal of the improperly motivated charges. No basis exists for imposing the former requirement as a per se condition of discovery in every case, regardless of its circumstances.

The Solicitor General insists that this requirement imposes no significant barrier to any meritorious claim because detailed data about offenders not prosecuted by the United States is always "readily accessible to the public." (U.S.Br. 35; see also *id.* at 15, 25-26)[65]. In any

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[65] In 1985 the Solicitor General made a similar argument in urging this Court to adhere to the harsh rule of *Swain v. Alabama*. "We are unpersuaded that *Swain* imposes an unduly difficult burden on defendants seeking to prove systemic exclusion. If the pernicious practice of racially-motivated exclusion in fact prevails . . . defense counsel could relatively easily keep the records necessary to make the required proof. . . . There are cases in which such statistics have been collected and produced . . . [Defense attorneys] are well situated to collect the requisite statistics." Brief for United States as Amicus Curiae, *Batson v. Kentucky*, No. 84-6263, pp. 6, 26-27. In *Batson*, this Court concluded, to the contrary, that *Swain* had established a

individual case in which such information was actually readily available to a defendant, the United States would have no need for the proposed per se rule, since the government could on that basis urge the district court to defer discovery in that particular case until the information had been brought forward by the defendant. The Solicitor General asks this Court to adopt a priori an irrebuttable presumption that such information will be available in *every* case; the primary impact of such a rule, of course, will be in precisely those cases in which the presumption is *incorrect*, and in which the presumption would operate to preclude a defendant with a possibly meritorious case from showing that in his or her case, contrary to the Solicitor General's somewhat breezy assumption, the information in question was in fact difficult or impossible to obtain[66].

The instant case presents just such a situation. In the district court respondents made a persuasive showing that information about state prosecutions, or about the

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crippling standard of proof, and *Swain* had as a consequence been understood in practice to sanction intentional discrimination on the basis of race.

[66] Requiring defendants in such cases to adduce, without the aid of discovery, statistically persuasive evidence that similarly situated whites had not been prosecuted would create the sort of "crippling burden of proof" established under *Swain v. Alabama*, 380 U.S. 202 (1965), and rejected by this Court in *Batson*. *Batson* noted that, despite the availability of discovery under *Swain*, requiring a defendant to investigate the circumstances of a substantial number of other cases could create very real "practical difficulties", and that "the burden would be insurmountable" if available government files did not contain racial identifications. 479 U.S. at 92 n.17.

race of federal or state defendants, could not readily be obtained.[67] Respondents' discovery requests were therefore expressly framed to obtain from the United States whatever information or documents it had regarding the race of state defendants or crack distributors in general. The United States did not seriously dispute that factual contention in the district court, and does not address here the fact-specific arguments made below. Instead, the Solicitor General urges this Court to hold that it is somehow impossible that comparative information would ever be difficult to obtain in the Central District of California or anywhere else in the nation, and that it therefore would be unnecessary and improper for a district judge ever to consider evidence intended to demonstrate the existence of a problem which, the government urges, could not possibly arise.

If, of course, comparative information were in fact always readily available, it would be of little consequence if the courts were to adopt such a conclusive presumption of availability, and then place on the United States, rather than on the defendant, the nominal burden of bringing that evidence into court. That is precisely the result of the holding of the en banc court below that all races will be presumed to commit any particular offense unless the government adduces evidence to the contrary. (Pet. App.

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[67] "[S]ince the pertinent records relating to cases in the geographical area covered by the Central District may well be scattered across seven different county district attorney's offices, seven separate sheriff's departments, and a large number of independent local police departments, the defendants would have an almost impossible time compiling data on their own." Pet. App. 101a n. 6.

19a). If such information were readily obtainable, the Department of Justice would presumably welcome an invitation to bring forward evidence which might strongly support its position. Instead of blithely accepting a requirement that *it* produce this allegedly "readily available" information, however, the government warns that the burden – nominal when imposed on an indigent individual defendant – would cause horrific problems when imposed on the Department of Justice. *See* U.S. Br. 19-20, 35, Pet. App. 17, 23 n.3, 24, 26.

In reality, of course, the availability of data on the group of non-prosecuted offenders will vary from case to case; more importantly, so will the comparative ability of the United States Attorney and defense counsel to obtain the information. The direction of Rule 2 that Rules of Criminal Procedure be construed to avoid "unjustifiable expense and delay" admonishes trial judges to place the burden of producing such relevant information on the party able to do so with the least cost and delay. That admonition is particularly important where, as the district judge noted, the federal government will foot the bill either way, paying for the time of either the United States Attorney, the Federal Public Defender, or, at a far higher hourly rate, private counsel appointed to represent indigent defendants.[68] Where, for example, the United States has computer data available at the touch of a keyboard, no district judge would require – as would the government's proposed rule – that defense counsel recompile the same data by hand.[69] The government conceded in

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[68] J.App. 189-90.

[69] "[N]early all of the data necessary to a showing of selective prosecution are far less accessible to the defendants than to

the court of appeals that "certain law enforcement data is undoubtedly more accessible to the government"[70]; "most of the relevant proof in selective prosecution cases will normally be in the Government's hands." *United States v. Heidecke*, 900 F. 2d 1155, 1158 (7th Cir. 1990).[71]

The absence of comparative data is, of course, one of the factors which a court could consider in determining whether to permit discovery. The government concedes that discovery could in at least some circumstances be ordered without such evidence – whenever the United States Attorney confessed in court that he had sought a harsher penalty on account of race, a confession that might entail potential criminal

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the federal government. Federal and county law enforcement authorities cooperate closely in these cases, and both levels of government are involved in the decision whether to bring charges in federal or state court. . . . Given that the federal and local authorities work so closely investigating these crimes, the federal government probably already has records of the cases in which it declined to initiate federal prosecution. In any event, it is surely much easier for the United States Attorney's office to get this information from state officials, from the county prosecutor's offices, and from local police departments, than it is for criminal defense lawyers." J.App. 100a-101a, n. 6.

[70] Government's Response to Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 6 n.4.

[71] That defendants will often face difficulty in proving systemic discrimination by a prosecutor was explained by Justice Goldberg. "[The prosecution is] in the better position to develop the facts. The defendant is a party to one proceeding only, and his access to relevant evidence is obviously limited. The State is a party to all criminal cases and has greater access to the evidence. . . . " *Swain v. Alabama*, 380 U.S. 202, 240 (1965) (dissenting opinion).

liability. There is, however, no reason to insist that a colorable showing of materiality be made in this or any other particular manner. On the government's view, where a written confession of just such an unconstitutional purpose was in the United States Attorney's files, but no comparative data could be obtained by the defendant, a district court would be powerless to order disclosure of that very confession.

In the intensely practical task of managing discovery, district judges must be accorded considerable discretion to decide in what direction discovery would most effectively proceed. The government proposes that in every selective prosecution case a defendant must first address any relevant issue about similarly situated offenders, and in doing so may resort to subpoenas of state information, but not to discovery of federal information. Surely, however, where the United States has the same information as state authorities, a district judge could and ordinarily should direct the United States to produce it, if only because the United States, and not the state, is a party to the proceeding. Regardless of the location of such comparative data, a district judge might sensibly choose to focus discovery on other issues where the information was more accessible or more likely to be dispositive.

C. No Special Heightened Standard of Proof Should Be Applied to a Defense Based on Racial Discrimination by Prosecutors or Other Law Enforcement Officials

The government urges this Court to hold that where a defendant asserts that he was selected for prosecution on account of his race, or for some other constitutionally

impermissible reason, the defendant can only prevail by establishing that factual assertion with "exceptionally clear proof." (U.S.Br. 18). At this point in the instant case, of course, consideration of that issue would be premature. The district court has not reached the merits of respondents' claims, or even scheduled a hearing on them. Questions regarding the quantum of proof necessary to establish a selective prosecution claim cannot fairly be said to be encompassed by the Question Presented regarding discovery.

This Court's decision in *Wayte v. United States*, 470 U.S. 598 (1985) is dispositive of the government's contention. *Wayte* makes clear that "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards." 470 U.S. at 608. In an ordinary equal protection case a plaintiff alleging intentional racial discrimination need only demonstrate that fact by a preponderance of the evidence. In assessing the selective prosecution claim in *Wayte*, the Court applied equal protection decisions concerning employment discrimination, 470 U.S. at 608-09 (*citing Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) and *Washington v. Davis*, 426 U.S. 229 (1976)), housing discrimination, 470 U.S. at 609 (*citing Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)), and jury discrimination. 470 U.S. at 608-09 (*citing Castaneda v. Partida*, 430 U.S. 482 (1977).)

The exercise of peremptory challenges by a prosecutor, like decisions to initiate a prosecution, involves a substantial degree of discretion, yet this Court has applied ordinary standards of proof in evaluating claims that a prosecutor utilized a peremptory challenge to

exclude a prospective juror on the basis of race. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court overturned *Swain v. Alabama*, 380 U.S. 202 (1965), because the special stringent evidentiary requirements of *Swain* were "inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." 476 U.S. at 93. In delineating the standard of proof applicable to a prosecutor's use of peremptory challenges, *Batson*, like *Wayte*, relied on Equal Protection decisions related to discrimination in employment, housing, and jury selection, as well as Title VII case law. 476 U.S. at 93-95 and n. 18. Similarly, no special standard of proof is applied in evaluating a claim that a prosecutor vindictively increased the charges against a defendant in retaliation for the exercise of some constitutional right. *United States v. Goodwin*, 457 U.S. 368, 380 n. 12 (1982).

The reference in *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987), to a need for "exceptionally clear proof" is easily distinguishable from the instant case. First, many of the decisions at issue in *McCleskey* had been made by jurors, whom it was impracticable to question about their motives, and the questioning of whom has traditionally been presumed inappropriate absent quite extraordinary circumstances. Prosecutors, on the other hand, are routinely asked by courts to explain their actions, e.g. *Batson*, and here, as in other cases, the government has volunteered explanations for its actions, resisting only discovery which might tend to undermine those explanations. Second, the patterns evident in *McCleskey* involved literally thousands of jurors over a period of years scattered

across an entire state, individuals who could not conceivably have acted with in consultation or with a conscious common plan. A claim of selective prosecution, on the other hand, like a claim of systematic discrimination under *Swain v. Alabama*, involves at most a far more limited number of prosecutors, all working for the same agency and presumably responsive to similar pressures and incentives.

III. THE DISTRICT JUDGE DID NOT ABUSE HER DISCRETION IN ORDERING THE LIMITED DISCOVERY IN THIS CASE

This case palpably presents the type of circumstances in which a district judge has the discretion to order an appropriate form of discovery.

The government did not contend below, and does not argue here, that the discovery request initiated by the Federal Public Defender was a mere fishing expedition. The fact that *all* crack cases closed by that office for an entire year involved black defendants provided counsel for respondents with a colorable basis for believing that a selective prosecution defense would be available, and assuredly warranted further inquiry. It is difficult to see how a responsible defense attorney would have failed to do so. While subsequent discovery and litigation will undoubtedly throw more light on this singular circumstance, the United States does not contend that there was some innocent explanation so obvious to all that counsel for respondents could not seriously have believed that discrimination might be at work. On the contrary, almost two months after respondents presented this study along

with their motion for discovery, the Assistant United States Attorney responding to the motion confessed that he still had "no explanation" for the facts which it revealed. (J.App. 150).

Neither does the Solicitor General suggest that, once counsel for respondents had seen the material offered by the government in its motion for reconsideration, the only reasonable conclusion they could have drawn was that there was no longer any colorable basis for pursuing a selective prosecution defense. To the extent that the government was arguing that virtually all crack dealers in the area were black, the personal experience of one of respondents' attorneys was to the contrary. Although the government proffered declarations from two law enforcement officials denying any racial motive, prior filings in this case raised serious questions about the reliability of both officials.

The United States does not suggest that the type of discovery sought below was not material to respondents' selective prosecution claim. On the contrary, both in the courts below and in this Court the government's arguments have focused on the very type of information which respondents sought to obtain through discovery. In this Court the Solicitor General stresses the importance of evidence concerning non-blacks prosecuted in state courts in the Central District of California; that was one of the very items of information sought by the discovery request. The government relies on its own undeniably anecdotal information about the race of federal crack defendants, and suggests the scope of the Federal Public Defender's presentation was too limited (U.S.Br. 27, 32

n.3); production of documents providing more comprehensive information about these very issues was one of the central purposes of the requested discovery. The United States obviously does not dispute the relevance of its own purported selection criteria to a determination of whether the decision to prosecute respondents had a non-racial basis.

The district judge properly considered the comparative ability of the parties to obtain information of obvious relevance, and assessed the relative costs involved. (J.App. 189-90). In this Court, the Solicitor General argues repeatedly, albeit without explanation, that respondents had ready access to information about the number and racial distribution of crack defendants in state court. (U.S.Br. 26, 35). But that is the very factual argument which three years ago was made by the United States Attorney and rejected by the district court. The government makes no assertion that the lower court's finding on this issue was clear error.

The trial judge's familiarity with local circumstances, and her 12 years on the federal bench, were of obvious importance in evaluating the material submitted by the United States Attorney and relied on in this Court by the government. The lead police and ATF investigators, for example, insisted that they had no idea of the race of the individuals involved when they began their investigation of a suspected crack ring in Inglewood; any judge in Los Angeles, however, would understand that law enforcement officials would know full well that an investigation targeted at Inglewood, rather, for example, than at the hispanic community in Van Nuys, or the white suburb of Simi Valley, would lead to the arrest of black suspects.

The government suggests that the pattern of federal prosecutions could be explained by considering the weight of the narcotics which a suspect was charged with distributing. (U.S.Br. 35-36 n.4). But a federal judge sitting in the Central District of California has substantial first hand experience, which appellate judges would not, with which to evaluate such a claim, drawing, for example, on her knowledge of the comparative size of the sales with which black crack dealers and white powder cocaine dealers were being charged in that federal court.

The primary thrust of the government's argument in this Court is that respondents did not properly compare the pattern of federal prosecutions with the treatment of "similarly situated" non-blacks. But over the course of this litigation the government has had a series of quite different positions as to which other offenders should be regarded as "similarly situated." In August, 1992, the government filed a memorandum insisting the proper comparison group was non-black cocaine base dealers.[72] A month later, the government filed a second memorandum insisting, to the contrary, that "the proper universe of similarly situated defendants in this case is all narcotics offenders indicted under 21 U.S.C. § 841 and 846."[73] In the Ninth Circuit, the government suggested to

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[72] Government's Opposition to Defendants' Motions for Discovery, p. 6.

[73] Government's Motion for Reconsideration of Order for Discovery, p. 10. The government also argued, "In contrast, defendants have asked this Court to adopt an overly narrow definition of similarly situated law breakers to be crack cocaine offenders, rather than the appropriate universe of all federal narcotics offenders in that same time period." *Id.*

the original panel that "the proper universe of similarly situated defendants" was "[g]enerally all those offenders that have violated the same criminal statute . . . all federal narcotics offenders indicted under 21 U.S.C. §§ 841 and 846."[74] In its brief to the en banc court, however, the government asserted that a "similarly situated individual" would be one "with a similar criminal background and similar offense conduct."[75] In this Court, the government advances three alternative definitions of "similarly situated": (a) individuals "eligible for prosecution" (U.S.Br. 14, 32, 37) (b) persons guilty of "dealing in crack" (U.S.Br. 30) and (c) persons who distribute "more than 50 grams of cocaine and . . . use . . . firearms." (U.S.Br. 35-36 n.4). The district court cannot fairly be faulted for declining to address, as a precondition of any discovery, a fact-bound issue regarding which the government's own position continues to evolve, or for failing to require respondents to present in 1992 a study that took into consideration "criteria" yet to be delineated.

The record, of course, does contain declarations indicating that there are indeed a substantial number of non-black crack dealers. The government asserts without explanation that the district court did not rely on this information. (U.S.Br. 28 n.2). The government, however, made no such assertion in the court of appeals, and the panel decision held that the district judge had relied on this evidence. (Pet. App. 82a-83a). In her January 5, 1993, bench opinion, the district judge stressed that she had

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[74] Brief for Plaintiff-Appellant, p. 16 n. 7.

[75] Appellant's En Banc Brief, p. 6.

"reviewed all of the evidence offered by all parties"[76], and singled out only another item of evidence offered by respondents as not persuasive.[77] The government also contends that the court of appeals did not base its ruling on this evidence (Reply Brief for the United States, 4 n. 1); in fact the en banc court expressly relied on that evidence. (Pet. App. 22a-23a, 30a).[78]

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[76] J.App. 218.

[77] *Id.*

[78] The government also argues that this evidence is insufficient to provide a basis for the discovery order, criticizing it as "vague, conclusory, and impressionistic hearsay." (U.S.Br. 35 n. 4). This fact-bound evidentiary issue is not fairly encompassed by the Question Presented.

The government advanced no objection to the form or sufficiency of this evidence when it was offered in the district court, and it is thus precluded from raising such objections on appeal. (Pet. App. 98a-99a and n.5). The Reed declaration was based in part on personal experience on the bar referral panel which provided counsel for indigent state defendants. (J.App. 140-41). In this Court, on the other hand, the government invokes an affidavit of the DEA Public Information Officer that is to a substantial degree hearsay. (J.App. 71-74) ("My knowledge is based upon numerous reports and publications . . . and attending various seminars, meetings, lectures, and conventions.")

United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990), does not limit the type of evidence on which a district court can rely in exercising its discretion to order discovery. *Triplett* concerned the quantum of evidence necessary to warrant a determination that a nation-wide administrative system mandated by Congress is unconstitutional. Far from attacking the constitutionality of any federal statute, respondents seek to enforce the prohibitions against discrimination in punishment embodied in 18 U.S.C. § 242 and 28 U.S.C. § 994(d). The instant appeal concerns only the practices of a particular United States Attorney's office, and will resolve, not the merits of a constitutional

The government suggests, in the alternative, that respondents should have introduced a study that took into consideration whether non-black narcotics defendants had distributed more than 50 grams of crack or had used guns. But a central purpose of the discovery request and order in this case was to obtain from the government an official articulation of its prosecution criteria, against which the government's actions could be assessed. It makes no sense to require respondents, as a condition of obtaining that discovery, to guess in advance what criteria the government would announce years later on appeal, or to conduct a study based on the very sort of information which respondents needed discovery to obtain. The government does not even suggest that the information necessary to prepare this sort of proposed study, such as data on the quantity of narcotics distributed by state and federal defendants, was in any way available to respondents.

CONCLUSION

This case arises out of the decision of a responsible and experienced federal judge to permit a limited inquiry into a single claim of racial discrimination in the criminal justice system. That the order in question was issued by the United States District Court in Los Angeles is neither unimportant nor necessarily coincidental. Elimination of

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claim, but merely the availability of discovery that bears on that claim. Respondents seek discovery for the very purpose of obtaining more "solid and credible evidence" to sustain that defense.

racial discrimination from the criminal justice system is the overarching equal protection problem of our time, as deeply harmful and frustratingly intractible today as was school segregation four decades ago. This appeal on its face concerns seemingly pedestrian issues of discovery and standards of proof. But as the sorry history of *Swain v. Alabama* well illustrates, there comes a point at which a concatenation of technicalities can vitiate the constitutional promise of equal protection of the law.

The Constitution confers upon federal judges a pivotal role in the process of eradicating discrimination root and branch both from the practices of government parties and from their own courtrooms. Implementation of the non-discrimination principle often turns less on abstract legal doctrine than on the perspicacity and practical judgment of district judges sensitive to the intricacies of local practices and realities. In the instant case Judge Marshall has taken only a modest step, foreswearing any preconceptions about the merits of the discrimination claim, asking only for a full explanation of the type of pattern that is deeply troubling to the American people. That action warrants not reversal but commendation by this Court.

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

1. *United States v. Washington,* CR 91-632-TJH (CDCA), Government's Opposition to Defendant's Motion to Dismiss Re: Selective Prosecution, Declaration of David C. Scheper, Chief of Criminal Complaints Section, 9/90 – 6/92, dated August 6, 1993 at ¶ 5: " . . . federal agents had properly brought the case to the U.S. Attorney's Office, and the case met our prosecutorial guidelines. These facts, as well as . . . intelligence that at least one of the defendants was affiliated with a street gang, led to the decision to prosecute the defendants."

2. *United States v. Washington,* CR 91-632-TJH (CDCA), Hearing of December 13, 1993 at 18, l. 16-21. Assistant United States Attorney Steven Clymer: "Is gang affiliation or gang membership alone an aggravating circumstance under the guidelines (for prosecution)? [D]id it play a role in the charging decision . . . ? The answer to both these questions despite any ambiguities in earlier pleadings is no."

3. *United States v. Jamar,* CR 95-432-WMB (CDCA), Government's Opposition to Defendant's Motion to Compel Discovery at 28: "The Task Force [Los Angeles Metropolitan Task Force on Violent Crime] uses both state and federal criminal statutes to dismantle violent street gangs and prosecute their members."

4. *United States v. Washington,* CR 91-632-TJH (CDCA), Hearing of September 27, 1993 at 18, l. 17-20; 20, l. 5-8: The Court: I have yet to see any written criteria. Assistant United States Attorney Julie Werner-Simon: Well, there aren't [any]. . . . In fact there is a discussion. The complaints section has a meeting with a supervisor where

they set around and they talk about the criteria, and they establish whether they're sufficient enough to go forward."

Hearing of October 28, 1993 at 6, l. 24-25; 7, l. 1-5: Defense Attorney Paul Rochmes: "The government filed a document that they called a Clarification of Correction, which said that even though at the hearing on September 27th we've been told that there were no written prosecutorial criteria for cocaine-based cases, there are. . . . But those were not attached."

Hearing of December 13, 1993 at 4, l. 24-25; 5, l. 1-6: Assistant United States Attorney Steven Clymer: " . . . as we pointed out to both the parties and the Court in our written filings of the guidelines and our notice of the under seal filing, it's our position that the dissemination of our office's written guidelines will serve no purpose . . . but merely offer a guideline or manual . . . how to avoid federal prosecution."
